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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERIC BECERRA, Plaintiff/Appellant, v. TUCSON POLICE DEPARTMENT; CITY OF TUCSON; MARIA HAWKE, Defendants/Appellees.	2 CA-CV 2008-0106 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20060513

Honorable Michael O. Miller, Judge

AFFIRMED

David Lipartito — Tucson

and

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H O W A R D, Presiding Judge.

¶1 Eric Becerra appeals from the trial court's denial of his motion for new trial following a jury verdict in his lawsuit against the City of Tucson, Tucson Police Department, and Officer Maria Hawke.[1] Because the trial court did not err or abuse its discretion, we affirm.

¶2 The parties generally do not dispute the following facts. This litigation arose from an incident during which Officer Hawke shot Becerra in the abdomen. Becerra sued the City of Tucson, Tucson Police Department and Hawke ("defendants"), alleging assault, battery, negligence, and both intentional and negligent infliction of emotional distress. During trial, Becerra presented evidence of damages, including "uncontested medical bills."[2] The jury returned a verdict "in favor" of Becerra but awarded zero damages. The jury further

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[1]The caption in this case initially reflected the defendant officer's name as Maria Cabrera. In a minute entry dated April 4, 2008, the trial court ordered the caption amended to reflect the officer's "true name of Maria Hawke."

[2]Becerra contends on appeal that damages in this case were contested, while the defendants contend they were not, at least as to medical bills. The trial court specifically found "uncontested medical bills" in its minute entry ruling on the motion for new trial. Neither party has provided us with relevant trial transcripts to substantiate the presentation of evidence at trial, and we therefore assume the missing transcripts support the trial court's finding. *See In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003); Ariz. R. Civ. App. P. 11(b). Furthermore, in sharp contrast to his position in this court, Becerra stated in his motion for new trial: "The fact of damages and the fact that damages were substantial were not disputed at trial." Becerra also asserted that "uncontradicted, unimpeached and in many cases undisputed evidence of grievous physical and emotional damage" was submitted. At the hearing on the motion for new trial, the defendants conceded that at least $68,000 in special damages had been proven.

apportioned fault fifty percent to Becerra and fifty percent to defendants. Neither party objected to the verdict, and the jury was excused. Subsequently, Becerra filed a motion for new trial, asserting the damages were inadequate and the verdict was "the result of passion and prejudice" and was unsupported by the evidence. The trial court denied the motion, concluding Becerra had waived any objection to the verdict by failing to raise the issue before the jury was discharged.

¶3 Becerra argues the court erred in concluding he had waived any defect in the jury verdict by failing to object pursuant to Rule 49(c), Ariz. R. Civ. P., and in denying his motion for new trial. We review the denial of a motion for new trial for an abuse of discretion. *Mullin v. Brown*, 210 Ariz. 545, ¶ 2, 115 P.3d 139, 141 (App. 2005). But whether the trial court was correct in concluding Becerra had waived his objection to the jury verdict is a question of law that we review de novo. *See Perguson v. Tamis*, 188 Ariz. 425, 427, 937 P.2d 347, 349 (App. 1996) (interpreting meaning and effect of court rule is question of law).

¶4 Rule 49(c) provides that, when a "verdict is not responsive to the issue submitted to the jury, the court shall call the jurors' attention thereto, and send them back for further deliberation." Under the rule, the party who believes the verdict is inconsistent, defective, or nonresponsive must move to have the case resubmitted in order to preserve the issue for appeal. *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, ¶¶ 38-39, 48 P.3d 485, 493 (App. 2002). In *Trustmark Ins.*, the jury returned a verdict in favor of plaintiff

Trustmark for negligence, found each party fifty percent liable, but awarded zero damages. *Id.* ¶ 38. This court found that Trustmark had "waived any objection to the verdict by not objecting below." *Id.* ¶ 42.

¶5 The policy underlying waiver is to promote the "'just and efficient operation of the . . . courts'" by ensuring an error is corrected immediately and to discourage jury-shopping. *Gonzales v. Gonzales*, 181 Ariz. 32, 35-36, 887 P.2d 562, 565-66 (App. 1994), *quoting Cundiff v. Washburn*, 393 F.2d 505, 507 (7th Cir. 1968); *see also Piper v. Bear Medical Systems, Inc.*, 180 Ariz. 170, 179, 883 P.2d 407, 416 (App. 1993) (resubmitting case after return of nonresponsive verdict prevents "unnecessary further litigation"). However, waiver may not apply in limited circumstances such as when the jury's intent is clear and the verdict can be easily reformed to implement that intent or when it is apparent that resubmitting the case would have been futile. *See Wright v. Mayberry*, 158 Ariz. 387, 390, 762 P.2d 1341, 1344 (App. 1988); *see also Banner Realty, Inc. v. Turek*, 113 Ariz. 62, 63-64, 546 P.2d 798, 799-800 (1976) (objection to verdict not waived where jury's intent clear and error in computing damages easily corrected); *Berry v. McLeod*, 124 Ariz. 346, 350, 604 P.2d 610, 614 (1979) (no waiver where parties agreed verdicts were "hopelessly inconsistent" and returning case to jury would be futile).

¶6 Here, the court instructed the jury as follows:

> If you find that Maria Hawke and the City of Tucson were at fault, then they are liable to Eric Becerra, and your verdict must be for Eric Becerra.

> You should then determine the full amount of Eric Becerra's damages and enter that amount on the verdict form. You should then consider Maria Hawke and the City of Tucson's claims that Eric Becerra was at fault.
>
> On Maria Hawke and the City of Tucson's claim that Eric Becerra was at fault, you must decide whether Maria Hawke and the City of Tucson had proved that Eric Becerra was at fault and under all of the circumstances of this case whether any such fault should reduce Eric Becerra's full damages.
>
> These decisions are left to your sole discretion. If you decide that Eric Becerra's fault should reduce his full damages, the court will later reduce those damages by the percentage of fault you have assigned Eric Becerra.

After instructing on the elements of the various theories of liability, the court then explained:

> Next, if you find any defendant liable to Eric Becerra, you must then decide the full amount of money that will reasonably and fairly compensate Eric Becerra for each of the following elements of damages proved by the evidence to have resulted from the fault of any defendant.

The court then listed various forms of damages and factors to consider including "the nature, extent and duration of the injury," pain and suffering, reasonable medical expenses, decreases in earning power, and "loss of enjoyment of life."

¶7 As stated above, the jury returned a verdict in favor of Becerra and finding the defendants fifty percent at fault, but awarding zero damages. In substance, the jury found the defendants bore half the responsibility for shooting Becerra but also found that Becerra had incurred no compensable injury from being shot. In the face of evidence of "uncontested medical bills" and the instruction that the jury "must . . . decide the full amount of money"

that would compensate Becerra, this verdict is facially inconsistent and nonresponsive to the court's instructions. It was therefore incumbent on Becerra to invoke Rule 49(c) and move to have the case resubmitted to the jury for further deliberation. *See Trustmark Ins.*, 202 Ariz. 535, ¶ 39, 48 P.3d at 493.

¶8 Becerra attempts to distinguish *Trustmark Ins.* on the ground that the cause of action in that case was based on negligence, which requires a finding of damages, but the causes of action here do not. But Becerra's claims of negligence and intentional and negligent infliction of emotional distress do require a showing of damages. *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007) (damages an element of negligence claim); *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, ¶ 11, 115 P.3d 107, 110 (2005) (actual, severe emotional distress an element of intentional infliction of emotional distress); *Gau v. Smitty's Super Valu, Inc.*, 183 Ariz. 107, 109, 901 P.2d 455, 457 (App. 1995) (plaintiff must prove physical injury as well as shock or mental anguish to recover for negligent infliction of emotional distress); *cf. Johnson v. Pankratz*, 196 Ariz. 621, ¶ 6, 2 P.3d 1266, 1268 (App. 2000) (proof of "resulting damage" not an element in claim for battery). More importantly, the pertinent cases, including *Trustmark Ins.*, have not limited the applicability of Rule 49(c) to cases in which damages are an element of the cause of action but are omitted from the verdict. *See, e.g.*, *Gonzales*, 181 Ariz. at 35-36, 887 P.2d at 565-66. Rather, the issue is whether the jury verdicts are inconsistent, defective, or nonresponsive.

¶9 Becerra, however, characterizes the jury's verdict as merely providing insufficient damages or as not justified by the evidence presented at trial, both of which would be proper grounds to raise in a motion for new trial. *See* Ariz. R. Civ. P. 59(a)(5), (8). To accept that characterization, we would need to accept Becerra's assertion that "the verdict is internally flawless but the damages it awards are inadequate." Instead, we agree with his statement in his motion for new trial: "The jury verdict cannot, as matter of law, stand on the ground that the jury could have found he suffered no damage from being shot." The damages award is not merely "inadequate," it is nonexistent. And that fact renders this particular verdict, as a matter of law, inconsistent, defective, and nonresponsive.

¶10 Becerra cites *Wright*, 158 Ariz. 387, 762 P.2d 1341, in support of his argument that the trial court should have ordered a new trial. The jury verdict in *Wright* was defective because part of the damages award was contingent on future events. *Id.* at 389, 762 P.2d at 1343. The court in *Wright* observed that any judgment incorporating the verdict would have been impossible to affirm because, inter alia, no authority existed to allow the trial court either to maintain jurisdiction over the case in order to award the future damages or to compel the plaintiff to perform the condition upon which the damages were contingent. *Id.* After concluding that the verdict could not be otherwise reformed to fulfill the jury's intent, the court held the objection to the verdict had not been waived and the only option was a new trial. *Id.* at 390-91, 762 P.2d at 1344-45. The same factors are not present here. Although the verdict in this case is inconsistent and unresponsive, the trial court would not be legally

precluded from entering a judgment incorporating the different provisions of the verdict without reformation.[3]

¶11 Becerra also relies on *Berry*, 124 Ariz. at 350, 604 P.2d at 614, for the proposition that waiver should not apply when verdicts are "hopelessly inconsistent" so that returning the case to the jury would have been "futile." But here, returning the case to the jury would not have been futile. On the contrary, explaining the problem and resubmitting the case for further deliberation would have allowed the jury to correct its error expeditiously, avoiding both the time and cost of a new trial as well as any risk of jury-shopping. *See Gonzales*, 181 Ariz. at 36, 887 P.2d at 566. Thus, all of the policy considerations that support waiver are applicable here. Because Becerra failed to invoke Rule 49(c), he has waived his objection to the verdict. *See Trustmark Ins.*, 202 Ariz. 535, ¶ 39, 48 P.3d at 493.

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[3]Becerra cites two wrongful death cases, *Sedillo v. City of Flagstaff*, 153 Ariz. 478, 737 P.2d 1377 (App. 1987), and *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, 163 P.3d 1083 (App. 2007), in support of his argument that waiver should not apply. But, as Becerra acknowledges, the issue of waiver under Rule 49(c) was not raised or considered in either case. Therefore, those cases are not relevant to our inquiry here.

Becerra also cites *Banner Realty*, 113 Ariz. at 64-65, 546 P.2d at 800-01, as an example of when waiver should not apply even though the jury returns a defective verdict. But, as this court observed in *Mayberry*, 158 Ariz. at 390, 762 P.2d at 1344, the jury's intent in *Banner Realty* was clearly ascertainable, and the defective verdict could be easily corrected to conform with that intent. In the present case, the jury's intent is not at all clear, and *Banner Realty* is therefore inapposite.

¶12 The trial court did not err in denying Becerra's motion for new trial.[4] We therefore affirm.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge

[4]Because we conclude the trial court properly denied Becerra's motion for a new trial on the grounds that he had waived his objection to the verdict, we do not address his other arguments on appeal.